No. 21,127

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HORACE MEYER, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

REPLY BRIEF FOR THE UNITED STATES

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CITATIONS

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PART A. APPELLEE'S ARGUMENT THAT A PARTY SHOULD BE PREJUDICED BY OPINIONS OF APPRAISERS UNACCEPTED AND UNAPPROVED BY THE PARTY LACKS MERIT

Throughout appellee's brief runs a series of assertions and assumptions as to the essential nature of the appraisal process in federal eminent domain which are clearly erroneous. Founded on these assertions are charges of concealment of the truth, misconduct on the part of government agents, concluding in the charge of "engaging in this shocking practice" (Br. 44). These charges are unwarranted. One basic assumption of this position is that it is reprehensible for a government attorney to review the work of appraisers, to refuse to present at the trial appraisals of which he does not approve or to cause modification

or changes in the report (cf. Br. 23–24, 30). The other basic assumption is that the appraisal process and the trial attorney's preparation are completely separate and unrelated (cf. Br. 22). Because of the error of both these assumptions, appellee's epithetical conclusions are invalid.

The assertion that the problem here is "a search for truth" (Br. 45) and the implication that the Government is seeking to conceal the truth are based on the premise that the objective is an ascertainable and definite fact. But, far from being a fact like whether the traffic light was red or green, or whether the claimant had a particular disease, in the ordinary case "assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. * * * Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons." *United States* v. *Miller,* 317 U.S. 369, 374–375 (1943). "But that guess must have a rational foundation." *Westchester County Park Commission* v. *United States,* 143 F. 2d 688, 692 (C.A. 2, 1944), cert. den., 323 U.S. 726. It is through the expert appraisers that the material essential to inform the factfinder (jury, judge or commission) to make that guess is furnished.

An appraisal opinion that does not have a rational foundation is irrelevant to the case. It is the need to exclude such irrelevant matter that has led to many appellate decisions (and, of course, many more unappealed trial court rulings) rejecting appraisers'

testimony, especially in the last 25 years.[1] Thus, in *United States* v. *Certain Interests in Property, etc.*, 296 F. 2d 264, 268 (C.A. 4, 1961), the court said: "However, where the factfinder bases a finding on opinion testimony of an expert witness whose stated reasons for his opinion are patently unsound and without support in the record, the reviewing court should reject, as clearly erroneous, the finding based on such testimony." In *State of Washington* v. *United States,* 214 F. 2d 33 (C.A. 9, 1954), cert. den., 348 U.S. 862, this Court affirmed a judgment setting aside a verdict awarding substantial compensation for the taking of roads, saying (p. 43):

> Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts upon which it is based. Opinion evidence in conflict with the physical facts, United States v. Hill, 8 Cir., 1933, 62 F. 2d 1022, 1025; United States v. Thornburgh, 8 Cir., 1940, 111 F. 2d 278, 280, is not substantial evidence, and may be disregarded.

In *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172 (C.A. 9, 1950), cert. den., 340 U.S. 820, judgments based on expert valuations were rejected because they actually represented business loss, not compensation for property taken, the Court speaking of disposition of "erroneous claims and theories of the experts" and stating (p. 178):

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[1] The expansion of federal activities during and since World War II, especially as to need for valuable properties, has produced a tremendous development of federal eminent domain law which is still continuing.

> Opinion evidence is not evidence of fact. The trier of fact is not bound to follow the expert. Based upon unwarranted theorems of the experts, the Judge found "severance damage" to the properties as a whole. Where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis for value by the Court, the evaluation will be set aside and the cause remanded for new findings. [Footnotes (citations) omitted.]

Another example is that since offers are not relevant evidence under federal condemnation principles, the exclusion of an expert opinion based on owners' asking prices was affirmed in *Atlantic Coast Line R. Co.* v. *United States,* 132 F. 2d 959, 963 (C.A. 5, 1943). A few other examples of rejection of expert opinions because of mistaken legal theories or factual errors are *United States* v. *Whitehurst,* 337 F. 2d 765 (C.A. 4, 1964); *United States* v. *Cooper,* 277 F. 2d 857, 862 (C.A. 5, 1960); *International Paper Company* v. *United States,* 227 F. 2d 201, 205 (C.A. 5, 1955); *United States* v. *158.76 Acres in Townshend, Vermont,* 298 F. 2d 559, 561 (C.A. 2, 1962); *United States* v. *Michoud Industrial Facilities,* 322 F. 2d 698 (C.A. 5, 1963), cert. den., 377 U.S. 916.[2]

It can hardly be said that, in directing exclusion of these experts' opinions, the courts were impeding "a search for truth," in appellee's words (Br. 45). Expert opinion is material to such a search only to the

[2] As these cases show, the question whether an expert is qualified is far different from the further question whether his opinion is properly based on fact and law so as to constitute substantial evidence of value under the federal standard.

extent that it is well founded in fact and law. Again, in these and the great mass of valuation decisions in federal condemnation law, when they reject appraisal evidence the appellate courts are directing appraisers to change their opinions and reports.[3] Appellee ignores the law in calling this a "shocking practice" (Br. 44).

These cases also illustrate the fact that the appraisal and legal aspects of the ascertainment of just compensation are intertwined and cannot be compartmented. The Supreme Court, in one of the leading cases on the subject, noted the connection in *Olson* v. *United States,* 292 U.S. 246 (1934), when it said (p. 257) that certain elements should be excluded from consideration "for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth." Legal and appraisal principles must coalesce and there must be cooperative effort and mutual understanding between the appraiser and the attorney. Moreover, neither appraisal principles nor federal rules of ascertainment of just compensation are static concepts, but both are in a development process recognizing increasing knowledge and new applications.[4] Since the valuation evidence is presented

[3] In *United States* v. *Pope & Talbot, Inc.*, 293 F. 2d 822 (C.A. 9, 1961), this Court directed remittitur of the amount of a particular item of depreciation in value testified to by the condemnee's witnesses.

[4] Illustrative of appraisal developments is the fact that "*The Appraisal of Real Estate*" by the American Institute of Real Estate Appraisers, one of the leading publications in the field,

through expert appraisers, it is only by adoption of approaches suggested by the attorney that such new developments may occur. One example is recent application of the rule excluding enhancement due to the project for which the land valued is taken. See *United States* v. *Crance,* 341 F. 2d 161 (C.A. 8, 1965), cert. den., 382 U.S. 815. Another example is the consideration to be given an increase in value of the remainder where only part of a tract of land is taken. *United States* v. *Fort Smith River Develop. Corp.,* 349 F. 2d 522 (C.A. 8, 1965).

Many elements of fact and law must be verified upon review before an attorney can approve of an appraisal as worthy of presentation to the court. In the Appendix, *infra,* we print a checklist for use by attorneys and appraisers which has been prepared by the Chief of the Appraisal Section of the Land and Natural Resources Division of the Department of Justice and used for some time.[5] Examples of "no" answers to almost any item on the list could be given. For example, as to Item 1, it was disclosed at the trial in *United States* v. *Runner,* 174 F. 2d 651 (C.A. 10, 1949), that what was valued as one tract of land actually was four tracts. In *United States* v. *2,648.31 Acres of Land in Charlotte & Halifax Counties,* 218 F. 2d 518 (C.A. 4, 1955), the trial court was reversed

is now in its fourth edition, the original text being published in 1951. The preface to the third edition noted a 1957 survey which "indicated that rewriting, amplification, and some revision and expansion of the text was desirable to keep the material in line with new developments in appraisal thought."

[5] The details of this list have not been officially approved and it is circulated simply as a suggestion of matters to be verified.

for holding that the taking of a flowage easement was the equivalent of a fee and, hence, refusing to permit the Government to value merely a flowage easement.

Certainly it is the duty of the attorney to his client, if not to the court, and of government attorneys as public officials, to review carefully the appraisal reports and to eliminate errors of fact or law. This has not the remotest resemblance to illegal wiretapping, to which appellee makes comparison (Br. 25).

PART B. APPELLEE FAILS TO GIVE VALID ANSWERS TO APPELLANT'S PROPOSITIONS

1. The federal discovery rules do not accord a party a right to compel revelation of everything he would like to know from his opponent or possible witnesses

Appellee simply ignores this point. His brief makes no mention of the latest Supreme Court decision on this subject, *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964), which emphasizes the duty of the court to keep discovery within bounds. Appellee cites no authority supporting the unlimited discovery of unapproved appraisals and the complete files of the appraisers as ordered here. We think the lack of any limitation, of itself, requires reversal.

Much emphasis is placed on California cases. But the issue here is the federal rule. As appellee's own citation, *Oceanside Union School District* v. *Superior Court,* 58 Cal. 2d 180, 373 P. 2d 439 (1962), says (p. 189), a recent article "indicates that there are almost as many rules as there are jurisdictions which permit discovery." Certainly the federal rule should be given the same meaning within this Circuit, whether the question arises in Arizona or California. Ari-

zona has refused to require the disclosure of the names of persons who may have been consulted "but whose testimony is not intended to be used." *State* v. *Whitman,* 91 Ariz. 120, 125–126, 370 P. 2d 273, 277 (1962). Appellee's California citations, in fact, support our position here. His own quotation (Br. 18) from the *Oceanside* case, *supra,* says: "Assumedly, petitioner [the condemnor] believes that its appraisers have arrived at a fair market value." The next paragraph of the opinion said: "The only distinction between disclosure at trial and pretrial discovery is one of time." We have no such belief as to the unapproved appraisals here involved. And certainly we cannot have as to the appraisal not yet received. And it is far more than a mere matter of time to permit the hostile attorney to delve into all the notes and files of the appraisers, as does the order here. Contrary to the order here, the *Oceanside* case recognized limits upon discovery. It said (58 Cal. 2d at p. 192): "The claim of 'work product' is not an absolute bar to discovery, but is a circumstance to be considered by the trial court in exercising its discretion."[6] Here the

[6] Appellee says that *People ex rel. Dept. of Public Works* v. *Donovan,* 57 Cal. 2d 346, 369 P. 2d 1 (1962), held that a landowner could offer in evidence the appraisal given to the condemnor's attorney but not used. That issue is not here involved. In fact, the *Donovan* case sustained exclusion of the opinion of the appraiser and by dictum simply stated that the attorney-client privilege did not bar production of that witness' opinion. Nor does it appear that, as appellee apparently conceives (Br. 18), the rejected expert opinion was offered merely to discredit the condemnor's case. Rather, it was an offer by the condemnee as an expert opinion on the question of value. As we have noted (Opening Br. 36), the only federal appellate holding we know of concludes that the fact that the

trial court has abandoned any exercise of discretion in particular cases. But when a motion for discovery is made, "The rule contemplates an exercise of judgment by the Court, not a mere automatic granting of a motion." *Alltmont* v. *United States,* 177 F. 2d 971, 978 (C.A. 3, 1950), cert. den., 339 U.S. 967.

II. Ground for discovery of the materials refused was not shown by appellee

A. Purely factual data was not refused

Appellee seeks to stretch "facts" beyond any fair meaning of the word. He says (Br. 31): "Comparable sales are factual data." Whether a sale occurred is factual. But whether it is "comparable" is the very heart of the opinion dispute in most condemnation cases. Comparability, when speeking of real estate, is, of course, a matter of degree. It is the essence of the judgment of appraisers as to which elements of various sales may best be compared to various elements of the property to be valued. Review of such matter is one of the most important factors in testing the validity of appraisals (see Appendix, *infra,* p. 22–23).

B. No good cause was shown for requiring discovery of the matters refused

Consistent with his position that discovery knows no limits and his silent rejection of the *Schlagenhauf* case (*supra*), appellee says there is no requirement of "good cause" when discovery takes the form of depositions under Rule 26, rather than the production of documents under Rule 34. But appellee's coun-

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Government consulted but did not use particular experts "is not relevant evidence of value."

sel did not merely ask questions. He demanded appraisal reports and the many other documents representing the complete files of the appraisers. His counsel said (W. Tr. 39): "I would like copies of everything that is available to me. As a matter of fact, I would like everything."[7] Appellee's argument (Br. 33–34) that "good cause" was shown is simply another form of the trial court's assertion that the existence of an appraisal in a condemnation case constitutes good cause. Such reduction of the "good cause" limitation to a mere formality is forbidden by *Schlagenhauf*. Appellee abandons (Br. 34) the district court's theory that it can compel binding statements by the parties of the claims of value. Because of Rule 71A(e) (Opening Br. 32), the landowner can always produce, at the trial, the surprise of which appellee complains (e.g., Br. 36, 39).

C. The material refused was not admissible evidence, its disclosure could not lead to the discovery of admissible evidence and it was not relevant to the subject matter of the case

Appellee's answer to this point is the fallacious argument, dealt with in Point A, *supra,* that attorneys have no right to review appraisal reports for legal errors or for accuracy. Going further, appellee's counsel has taken the position that erroneous appraisals are nevertheless discoverable. The only

[7] Rule 30(b), F.R. Civ. P., should be applied to require the same substance as the "good cause" limitation. See *Schlagenhauf*, *supra*. Otherwise, the bizarre result is produced of making the extent of permissible discovery depend on whether we ask the witness to answer a question orally or produce his written answer. Cf. *Alltmont* v. *United States*, 177 F. 2d 971, 977–978 (C.A. 3, 1950), cert. den., 339 U.S. 967.

possible use of such material at a trial would be to create prejudice from the fact that an erroneous appraisal had been rendered or that errors of law or fact had been committed which required correction. To permit such matters to influence the result, violates the basic tenet that just compensation is measured by "market value *fairly determined.*" *Olson* v. *United States,* 292 U.S. 246, 255 (1934); *United States* v. *Miller,* 317 U.S. 369, 374 (1943).

Appellee's attempted justification of the demand for information as to settlements (Br. 30), ignores the basic reason for excluding evidence of such settlements at the trial, which is that they are based on various nonvaluation factors, so that they are not "fair indications of market value." (See Opening Br. 37–38.) Appraisals of other properties are even more remote and present all the problems of the present case plus questions as to how far those other properties are comparable. Appellee implies identity in referring to the "property next door" (Br. 30). But problems are obviously raised even as to such property as to quantity, identity of use, etc. And appellee's demand in the trial court was not limited to the "property next door." Injection of such considerations in the case simply leads further away from the question of value of the tract here condemned. Those appraisals are as irrelevant, so far as discovery is concerned, as might be appraisals made for private persons for nongovernmental purposes. Reason requires, we submit, that discovery be confined to matters relating to the land condemned. Here again, appellee charges the Government (Br. 30) with shopping for

better appraisals, on the fallacious premise that the correction of legal or factual errors represents dictation to the appraisers of the amount at which they should value the property.

III. The protective provisions of the discovery rules should preclude the unlimited discovery sought by appellee

A. The discovery here sought was unjust to the public

Appellee's answer to this very important consideration is his vituperative attack upon the good faith of federal agents because of their reviews of appraisals for factual and legal errors.

B. The discovery here sought would annoy and embarrass the appraisers

Appellee's only answer (Br. 26–27) is the demand that appraisers should be held to a standard of perfection that is not required of anyone else, even attorneys. They should not, says appellee, be given an opportunity to correct such errors before their appraisals are made public and are subjected to the scrutiny of the hostile attorney. The argument is made that appraisals are desired "to enable the attorney to more properly evaluate his case and possibly achieve a settlement for his client" (Br. 27). Unapproved and perhaps erroneous appraisals could serve no such purpose. In any event, it seems somewhat contradictory for appellee's counsel to say that the Government should not be able to examine and secure the making of necessary corrections in its appraisers' reports but that, by discovery, appellee's counsel can have those appraisers correct his mistakes in evaluation "of his case." Moreover, we cannot find even attempted justification for delving into all the notes and other matters contained in the ap-

praisers' files which they demanded and the court ordered disclosed.

Appellee simply glosses over the problem of who is to pay the expert appraisers' fees. This is no small matter, in view of the charge of $100 a day or more of trained and experienced appraisers and the unlimited nature of examination here ordered. The fact that, in this particular case, answers were refused to the unlimited inquiry sought by appellee because, in the Government's view, they went beyond all bounds of permissible discovery and in order to establish a test case, does not render the problem of compensation irrelevant when determining what discovery should be permissible. Nor does it justify appellee's questioning of "the propriety or sincerity of this argument" (Br. 32). Courts have not deemed consideration of the question improper. And we note the complete absence of an offer by appellee to compensate the appraisers for the time they spend on the discovery proceedings—proceedings which appellee's counsel say is designed in part to permit him "to more properly evaluate his case" (Br. 27). Why should his opponent be required to pay such expenses?

C. The "work product" principle of Hickman v. Taylor, 329 U.S. 495 (1947), should preclude the discovery here sought

Appellee, like the district court, rejects the "work product" principle of *Hickman* (Br. 21–22), even though his own authority, the *Oceanside* case, recognizes its relevance. (See *supra,* p. 8). Since *Hickman* does not rest on the attorney-client privilege, there is no logical reason why its principle does not apply to preclude discovery of the thought processes

and notes of the persons performing functions similar to those of an attorney. The second sentence of *Hickman* indicates this when it says (329 U.S. at p. 497): "Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care." The Court continued: "It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work."

And appellee ignores the unapproved and unaccepted nature of the appraisers' work involved in this case. All of the assertions made at page 22 of the brief as reasons for claimed discovery could equally be said as to the attorney's work. Thus, appellee actually is saying *Hickman* is wrong.

We think the several condemnation cases where federal district courts have considered the "work product" principle are correct (see Opening Br. 51). Appellee's attempted distinction of some of these decisions on the ground that *Hickman* enlarged the rules of discoverability, so that, to appellee, it knows no bounds, ignores the actual holding of *Hickman* and uses its language out of context. The unanimous holding of *Hickman* was that the discovery there ordered by the trial court was too broad and conviction for contempt of that order was reversed. The language of *Hickman* quoted by appellee, which speaks of a broad and liberal treatment of discovery rules (Br. 13–14), is immediately followed, in language not quoted by appellee, by consideration of the other side of the coin, the Court saying (329 U.S. at

p. 508): "But discovery, like all matters of procedure, has ultimate and necessary boundaries." The balance of the opinion is devoted to defining the boundary as applied to the problem there presented.

Appellee's attempted distinction (Br. 34–35) of some of the great majority of decisions which deny discovery of expert appraisal opinion in condemnation cases, on the ground they were decided before *Hickman,* lacks merit. Even the minority of three federal cases requiring some disclosure (Br. 17, 29, 31, 37–38) do not permit the unbridled exploration of the appraisers' personal files, as here ordered, or the revelation of the many collateral matters which would neither be admissible evidence or, when disclosed, would not lead to admissible evidence. None of these cases suggests that discovery will be ordered of unaccepted and unapproved appraisals. On the contrary, the only opinion on it assumes that discovery of appraisals by persons who will not be called at the trial should be denied. See *United States* v. *Certain Parcels of Land, Etc.,* 15 F.R.D. 224 (S.D. Cal. 1954), and appellee's comments thereon (Br. 36–37). As we have noted (*supra,* p. 4), satisfaction with the qualifications of the appraiser is only the beginning point to determining whether his appraisal may properly be relied upon at the trial or in settlement negotiations.

Appellee also relies upon the article by Friedenthal (Br. 22–23) and upon decisions (Br. 19) which generalize about expert evidence, without distinction as to the kind of expert involved or the issue in the case. No court would think of telling a medical expert that, in determining whether a person had a particular

disease, a particular factor should be disregarded. But that is the result of rulings in eminent domain valuation (*supra,* pp. 3–5). Thus, one cannot generalize in this field, and, we submit, decisions concerning other kinds of experts in other kinds of cases are of little help in solving the present problem.[8] They, of course, give no consideration to the various factors that we have discussed. And the cases recognize the responsibility of the court to keep discovery within proper bounds, rather than the unlimited exploration of files here ordered.

Comment should be made on appellee's assertion that in other cases the Government "has taken a diametrically opposed position to the one which it takes in the case at bar" (Br. 19). The many condemnation cases we have cited (e.g., Opening Br. 33, 51) show a consistent position. Only one of the three cases cited by appellee to support his assertion (Br.

[8] *Sachs* v. *Aluminum Co. of America*, 167 F. 2d 570 (C.A. 6, 1948), involved an expert on X-ray metallography, where the objection made was the attorney-client privilege; *Bergstrom Paper Co.* v. *Continental Ins. Co.*, 7 F.R.D. 548 (D. Wis. 1947), concerned experts relating to the cause of an explosion in a manufacturing plant and, unlike the proceedings in this case, examination was limited; *Ledwig* v. *United States Rubber Co.*, 23 F.R.D. 220 (D. Mont. 1959), did not directly involve experts, but rather interrogatories concerning chemical analysis, etc., of rubber mine boots which caused injury; *Russo* v. *Merck & Co.*, 21 F.R.D. 237 (D. R.I. 1957), did not involve experts at all, but rather factual matters known only to the defendant as to method of production of blood plasma; and *Broadway & Ninety-Sixth St. Realty Co.* v. *Loew's, Inc.*, 21 F.R.D. 347 (S.D. N.Y. 1958), was a private antitrust case where the examination was of officers and agents of the defendants and where the court did rule out many matters.

19) involved valuation in any form.[9] That case, *Seven-Up Bottling Company, Inc.* v. *United States,* 39 F.R.D. 1 (D. Colo. 1966), was a tax refund case where the issue was valuation of corporate assets and the deposition of the Government's expert had already been obtained. The court recognized that (p. 2): "[T]he majority of the cases which have considered the subject have denied access, at least to the conclusions of an adverse expert witness." Almost all of the discussion is addressed to the question of the expense of the deposition, which the court reserved for later assessment as costs. This case has no tendency to support appellee's unlimited examination, including all of the appraisers' files or other matters here ordered, as to appraisals which have not been accepted and approved by the Government.

D. The purposes of the discovery rules will not be served by the discovery here ordered

Appellee disagrees (Br. 28–29) but he gives no answer, in reason or experience, to our view (Opening Br. 52–53) that an intelligent trial attorney will not stipulate to exclude detailed consideration of relevant factors which will be persuasive to the fact-finder.[10] Appellee says that the view of *United States*

[9] *United States* v. *38 Cases, More or Less, Etc.*, 35 F.R.D. 357 (W.D. Pa. 1964), and *United States* v. *Nysco Laboratories, Inc.*, 26 F.R.D. 159 (E.D. N.Y. 1960), involved charges of misbranding under the Food and Drug Act, and the discovery sought was of doctors hired by a prospective distributor of the product (the *38 Cases* case) or of interrogatories concerning medical and scientific facts (*Nysco*).

[10] The fact (Br. 28–29) that this particular case as to wide-open discovery of appraisers has been delayed pending the test

v. *900.57 Acres in Johnson and Logan Counties,* 30 F.R.D. 512 (W.D. Ark. 1962), that, based on 20 years of experience in trying thousands of tracts of land, discovery would greatly prolong the trial, is "unsound" (Br. 35). This is merely counsel's assertion, unsupported by authority or reasoning. We submit that the depositions here sought, involving a great mass of material which would not be admissable as evidence at the trial, cannot be dismissed as involving merely "a minor expense" [11] and that undue consumption of time is obvious (Br. 35).

IV. In any event, the district court had no jurisdiction to set aside the declaration of taking and dismiss the proceeding

Appellee does not answer this Court's holdings in the *Carey* and *Hayes* cases and the specific language of the Declaration of Taking Act. And the explicit notes of the rulemakers, that the rules are not intended to modify that Act, are also ignored. To say that the United States is subject to the rules of discovery (Br. 42) does not establish an amendment to the Declaration of Taking Act empowering the court to revest in the condemnee title which has vested in the United States under a valid declaration of taking.

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has no bearing on the general question whether the time of the courts and counsel would be saved by the discovery sought.

[11] If that is the case, appellee should have no serious objection to paying it.

CONCLUSION

It is submitted that the judgment below should be reversed.

Respectfully submitted.

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APRIL 1967.

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

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APPENDIX

Department of Justice, Land and Natural Resources Division, Appraisal Analysis

For Use by Attorneys and Appraisers

Name of Appraiser:
For What Agency:
Identification of Property (Civil No., Tract, etc.):

INSTRUCTIONS: Items not applicable, so indicate by (N/A) in negative blank. Use reverse side to explain all items marked "No". If 13 c. is marked "Yes" indicate action taken.

1. CAPTION (Compare with Declaration of Taking or Complaint)
   a. Project and Parcel No. Correct____ Incorrect____
   b. Owners Name Correct____ Incorrect____
   c. Legal Description Correct____ Incorrect____
   d. Total Area of Property Correct____ Incorrect____
   e. Area Acquired Correct____ Incorrect____
   f. Area of Remainder Correct____ Incorrect____
2. EFFECTIVE DATE OF APPRAISAL
   a. Coincides with D of T Yes____ No____
   b. Does not coincide with D of T but is satisfactory Yes____ No____
3. PURPOSE OF THE APPRAISAL
   a. Definition of value compatible with federal law Yes____ No____
   b. Estate appraised correct Yes____ No____
   c. Taking accurately defined Yes____ No____

4. METHOD OF APPRAISAL
   a. Appraisal method and technique compatible with appraisal's purpose and premise — Yes____ No____
   b. Before and after approach in partial taking supported — Yes____ No____
   c. Omission of one or more value approaches justified — Yes____ No____
   d. Were improvements and interests (mineral, gas, etc.) evaluated based on their contribution to the whole — Yes____ No____
   e. Salvage value of improvements and growing crop values considered — Yes____ No____
5. PROPERTY DESCRIPTION
   a. Land description—including soil types, topography, etc. — Yes____ No____
   b. Improvements—identified, located and described — Yes____ No____
   c. Minerals, gas, oil, timber and growing crops identified — Yes____ No____
   d. Description of property before and after taking — Yes____ No____
6. HIGHEST AND BEST USE
   a. Set forth and justified — Yes____ No____
   b. Alternatives discussed — Yes____ No____
   c. Highest and best use after the taking set forth and justified — Yes____ No____
7. MARKET DATA
   a. Cost data justified and supported — Yes____ No____
   b. Depreciation, including physical, functional and economic obsolescence defined, analyzed and supported — Yes____ No____

c. Income, expense and capitalization rates analyzed and supported Yes____ No____
d. Capitalization technique analyzed and supported Yes____ No____
e. Comparable sales verified, described, analyzed and related to subject property Yes____ No____
f. All sales reported whether or not comparable Yes____ No____

8. DAMAGES AND OFFSETTING BENEFITS
a. Appropriately outlined and discussed Yes____ No____
b. Adequately analyzed and supported Yes____ No____
c. According to federal law Yes____ No____

9. CORRELATION AND CONCLUSION
a. Appropriate discussion Yes____ No____
b. Conclusion sound and convincing Yes____ No____
c. Mathematical computations are correct Yes____ No____

10. CERTIFICATION
a. Standard clauses included Yes____ No____
b. Effective date of valuation established Yes____ No____
c. Appraised values set forth Yes____ No____
d. Signed Yes____ No____

11. EXHIBITS
a. Appropriate pictures Yes____ No____
b. Date of pictures established Yes____ No____
c. Map showing subject and comparables Yes____ No____
d. Plat plan, survey and map of area Yes____ No____

12. QUALIFICATIONS OF APPRAISER
    a. In report Yes____ No____
    b. Well qualified Yes____ No____
13. GENERAL
    a. Would appraiser be used as witness Yes____ No____
    b. Does Government have other appraisals Yes____ No____
    c. Are additional appraisals warranted Yes____ No____

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